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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 778

JOHN L. BISHOP et al.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Claims.**

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# SUPREME COURT OF THE UNITED STATES.

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JOHN L. BISHOP et al.,
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vs.

THE UNITED STATES OF AMERICA,
Defendant.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Claims.**

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioners, John L. Bishop, Ode Brown, Paul Brown, Verlie Brown, Chris Eugene Farris, Jr., David V. Lansden, John A. Lansden, Robert L. Lansden, Kenneth L. Martin, Frank Pettit, Edward Merlin Rolwing, Edward Merlin Rolwing, Executor of the Estate of Beatrice S. Rolwing, Deceased, Rose Rolwing, Beatrice Sickman, Beatrice Sickman, Executor of the Estate of Charles Sickman, Deceased, Orville Thomas, Herman Tucker, Ben Worthington and S. N. Yates, respectfully present their petition for the issuance of a writ of certiorari directed to the United States Court of Claims, and they show to this Honorable Court the following:

## I.

## OPINION BELOW.

The opinion of the Court of Claims has been officially reported, ... Ct. Cl. ..., 126 F. Supp. 449, and a copy of such opinion is appended hereto as Appendix A.

## II.

## GROUNDS OF THIS COURT'S JURISDICTION.

The date of the opinion and judgment of the Court of Claims was November 30, 1954, and the date when said judgment became final, on the denial of petitioners' motion for rehearing, was February 8, 1955. The date of this application for a writ of certiorari may be taken as the date of the filing of the petition in the office of the Clerk of this Court.

This Court has jurisdiction to review by certiorari the judgment of the Court of Claims by reason of 28 U. S. C., Sec. 1255 (1). The jurisdiction of this Court is invoked under such section and under Rule 19 (2) of the Rules of the Supreme Court of the United States.

The time within which this application must be made is 90 days. 28 U. S. C. 2101 (c), and Rule 22 of the Rules of the Supreme Court of the United States.

## III.

## QUESTION PRESENTED FOR REVIEW.

The question presented for review is:

1. Whether, under the allegations set forth in petitioners' petition in the Court of Claims, there has been a "taking" of petitioners' property or property rights within the meaning of the Fifth Amendment to the Constitution of the United States.

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IV.

## CONSTITUTIONAL PROVISION, STATUTES AND PRESIDENTIAL PROCLAMATION INVOLVED IN THE CASE.

Constitution of the United States, Amendment V:

" . . . nor shall private property be taken for public use without just compensation." U. S. C. Constitution, Amendment 5.

Sections 2 and 3 of the Migratory Bird Treaty Act as amended (49 Stat. 1555, 16 U. S. C. 1703 and 1704):

> "Unless and except as permitted by regulations made as hereinafter provided * * * it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, (or) kill, * * * any migratory bird, or any part, nest, or egg of any such birds, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702) and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936."
>
> "Subject to the provisions and in order to carry out the purposes of the conventions, * * * the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable

regulations permitting and governing the same in accordance with such determinations, which regulations shall become effective when approved by the President."

Migratory Bird Conservation Act as amended (45 Stat. 1222 et seq., 16 U. S. C. 715 et seq.). No particular section is involved herein, but the Act as a whole sets up the procedure for acquisition by the United States of inviolate refuges and sanctuaries for migratory birds. Section 5, for example, reads as follows (45 Stat. 1223, 16 U. S. C. 715d):

"The Secretary of the Interior is authorized to purchase or rent such areas as have been approved for purchase or rental by the commission, at the price or prices fixed by said commission, and to acquire by gift or devise, for use as inviolate sanctuaries for migratory birds, areas which he shall determine to be suitable for such purposes . . . "

Presidential Proclamation 2748, dated October 1, 1947, 12 F. R. 6521 et seq. See Appendix B.

V.

## STATEMENT OF THE CASE.

The petition filed in the Court of Claims was short and concise in conformity with that Court's rules. Said petition is hereinafter set forth, omitting however caption and prayers for judgment. Plaintiffs referred to in said petition are petitioners herein, and defendant referred to in said petition is respondent herein.

COUNT I.

1. All plaintiffs named in the caption hereof are parties to this Count I except Ben Worthington, Chris Eugene Farris, Jr., Verlie Brown, Ode Brown, Paul Brown, Orville Thomas and Herman Tucker.

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2. On October 1, 1947, the President of the United States signed Presidential Proclamation No. 2748, and it was filed with the Federal Register on October 2, 1947, and published therein on October 3, 1947, 12 F. R. 6521, 6523.

3. Said Proclamation established an area in Alexander County, Illinois, wherein the hunting of all species of wild geese was prohibited commencing on November 3, 1947, and at all times herein mentioned since said date there has been no hunting permitted of wild geese in the closed area established by said Proclamation.

4. From 1947 until December, 1951, plaintiffs Lansdens were the owners of two farms, containing approximately 700 and 500 acres, located wholly within said closed area.

5. From 1947 to February 10, 1951, Charles Sickman, who died on said date, and Beatrice Sickman owned a 145 acre farm wholly within said closed area, and since the date of Charles Sickman's death said farm has been wholly owned by said Beatrice Sickman, who is also the Executor of the Estate of Charles Sickman, Deceased.

6. During all of the years 1947 and 1948 and until February 2, 1949, one Beatrice S. Rolwing was the owner of a farm containing approximately 73 acres located wholly within said closed area. On February 2, 1949, Beatrice S. Rolwing conveyed said farm to plaintiff, Edward Merlin Rolwing, who continued to own said farm until June, 1952, and who is the Executor of the Estate of Beatrice S. Rolwing, Deceased.

7. Plaintiffs, Edward Merlin Rolwing and Rose Rolwing, his wife, during all of the years 1947 and 1948 and until February 24, 1949, were the owners of a 140 acre farm located almost wholly within said closed area. However, parts of the farm are outside of said closed area.

8. During all of the years 1947, 1948, 1949 and 1950 and until August 25, 1951, Beatrice S. Rolwing, the Executor

of whose estate is Edward Merlin Rolwing, a plaintiff herein, was the owner of a 200 acre farm located almost wholly within said closed area. However, parts of the farm are outside of said closed area. A short time after the death of said Beatrice S. Rolwing, plaintiff, Edward Merlin Rolwing, became the sole owner of said farm, which he sold in April, 1952, under a contract to purchase.

9. During all of the years 1947 to October 16, 1953, plaintiff, S. N. Yates, was then tenant on a 600 acre farm located wholly within said closed area, and as such tenant he had the sole and exclusive control of the right to hunt wild geese and conduct a goose hunting business on said farm.

10. During 1947 plaintiff, Kenneth L. Martin, was a tenant on one of the Lansden farms involved herein. Charles Sickman, whose personal representative, Beatrice Sickman, is a party herein, was a tenant on another Lansden farm in 1947. Plaintiff, Frank Pettit, was a tenant on the 73 acre Rolwing farm from 1947 to June 1, 1952. Plaintiff, John L. Bishop, was a tenant on the other Rolwing farm from 1947 to 1952.

11. All of the above mentioned persons or their predecessors in title, with the exception of the personal representatives of those who have died, for many years prior to 1947 made heavy capital investments and expended large sums of money in the development of hunting facilities for the taking of wild geese. At great expense and by the diligence of the aforementioned persons or their predecessors in title, substantial good will and profitable and flourishing hunting businesses were built up for the various farms involved herein.

12. The right to hunt wild geese is a property right, and the utilization of said property right for all of the above mentioned persons, except the personal representatives of those who are deceased, constituted a substantial source

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of livelihood, and the continued operations of hunting clubs and the utilization of the right to hunt, coupled with the good will built up for the various hunting clubs, were of great value to said persons.

13. Said Presidential Proclamation 2748 completely destroyed the property right of plaintiffs and the value of the hunting enterprises conducted by them and denied them a substantial source of livelihood and amounted to the taking of their property without just compensation in violation of the Fifth Amendment to the Constitution of the United States by establishing an inviolate wildlife refuge for wild geese.

14. No action has been taken on these claims by Congress or by any Department of the Government, but some of the plaintiffs attempted to enjoin the enforcement of said Proclamation 2748 but were unsuccessful therein. **Lansden v. Hart**, 168 F. 2d 409. Certiorari denied, 335 U. S. 858, 180 F. 2d 679. Certiorari denied, 340 U. S. 894.

15. All of the plaintiffs in this Count are the owners of their respective claims, and there have been no assignments or transfers of said claims or any part thereof.

(Demands for judgments for $164,500.00 omitted.)

COUNT II.

1. All plaintiffs named in the caption hereof are parties to this Count II.

2-10. Plaintiffs reallege paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Count I.

11. At the end of 1947 plaintiff, Kenneth L. Martin, ceased to be a tenant on the Lansden 500 acre farm involved herein, and during 1948 and 1949 became and was a tenant on the Lansden 700 acre farm involved herein. From 1948 through 1951 plaintiff, Ben Worthington, was a

tenant on the Lansden 500 acre farm. During 1949, 1950 and 1951 plaintiff, Chris Eugene Farris, Jr., was another tenant on the Lansden 700 acre farm. During 1950 plaintiffs, Verlie Brown, Ode Brown and Paul Brown were other tenants on the Lansden 700 acre farm. During 1950 and 1951 plaintiff, Orville Thomas, was another tenant on Lansden 500 acre farm. During 1950, 1951 and 1952 plaintiff, Herman Tucker, was a tenant on the Sickman 145 acre farm.

12. The respective plaintiff landowners and plaintiff tenants in the respective years above set forth operated farms and conducted agricultural operations on the respective lands involved herein, which involved the raising of substantial quantities of corn, soybeans and other crops.

13. On November 3, 1947, large numbers of wild geese concentrated in the closed area established by said Presidential Proclamation No. 2748. Thereafter large numbers of wild geese concentrated annually in said closed area from September in each year to the spring of the following year. Thereafter annually geese in a number not less than 20,000 were concentrated on the lands involved herein. During the time that said wild geese were concentrated in said closed area said geese made repeated and continuous flights to and from the lands involved herein and in connection with such flights consumed, ate up and destroyed substantial amounts of plaintiffs' crops, principally corn and soybeans, and such depredations by wild geese were continuous, repeated and extensive.

14. Said closed area was established for the purpose of creating rest and feeding grounds for wild geese and operated to concentrate a substantial portion of wild geese in the Mississippi Flyway on the lands involved herein, and in connection with the concentration of said wild geese, defendant's officers, agents and servants took affirmative

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ceese on the lands
steps to insure the concentration of wild gee tation or removal
involved herein and to prevent any molestat ed herein.
of any of the geese from the lands involved

nts and servants

15. The acts of defendant's officers, agent tial Proclamation
in effectuating the purposes of Presidentia upon the lands
No. 2748 operated to impose a servitude u e was continuous
and crops involved herein, which servitude s involved herein,
and repeated during the respective periods i an invasion of
and defendant created and maintained a t and continuous
plaintiffs' lands and crops of a permanent a cers, agents and
character. In addition, defendant's officer ocate wild geese
servants took steps to concentrate and loc All of the fore-
on the lands and crops involved herein. A ich imposed the
going resulted in the depredations which lved herein, and
servitude on the lands and crops involve erty for a public
there has been a taking of private propert violation of the
purpose without just compensation in vi he United States.
Fifth Amendment of the Constitution of the

e claims by Con-

16. No action has been taken on these c rnment or in any
gress or by any Department of the Governm s.
judicial proceeding of the United States.

t are the owners

17. All of the plaintiffs in this Count a e been no assign-
of their respective claims and there have b part thereof.
ments or transfers of said claims or any pa

omitted.)

(Demands for judgment for $86,500.00 o

VI.

**BASIS OF JURISDICTION OF FEDER ERAL COURT
OF FIRST INSTANCE.**

The Court of Claims was the court of fi f first instance in
this case and the basis of that Court's juri urisdiction is and
was 28 U. S. C., Sec. 1491, 62 Stat. 940, a ), as amended, 67
Stat. 226 and 68 Stat. 1241.

VII.

## ARGUMENT.

This is the fourth time that some of the petitioners and some other persons similarly situated have petitioned this Court for the issuance of a writ of certiorari so that the legal effect of respondent's activities in "regulating" wild goose hunting in the vicinity of Horse Shoe Lake State Game Preserve in Alexander County, Illinois, might be conclusively determined.

As in the instant case, none of the previous cases was determined on the merits. The complaints were dismissed on motion of defendant or defendants. **Lansden v. Hart** (first case), 168 F. 2d 409, cert. den., 335 U. S. 858; **Lansden v. Hart** (second case), 180 F. 2d 679, cert. den., 340 U. S. 824; and **Sickman v. U. S.**, 184 F. 2d 616, cert. den., 341 U. S. 939.

However, the instant case is the last and final opportunity petitioners (and others similarly situated) will have to obtain this Court's observations and opinion concerning their legal stature.

Previously, injunctive relief against defendant's agents and recovery in tort for the acts of defendant have been denied. **Lansden v. Hart**, both cases, and **Sickman v. U. S.**

This Court in **U. S. v. Gerlach Live Stock Co.**, 339 U. S. 725, held that denial of equitable remedies does not deny the existence of a right, the invasion of which would call for indemnification. The Court of Claims in **Coates v. U. S.**, 117 Ct. Cl. 795, 93 F. Supp. 637, held that a compensable tort could not be a "taking."

Therefore, following both suggestions, petitioners proceeded in the Court of Claims on a "taking" theory based on the Fifth Amendment to the Constitution of the United States, but that court rebuffed petitioners.

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The limits of the "taking" theory have not yet been spelled out by this Court or the Court of Claims. Certainly the more recent cases indicate that the "taking" theory has not been fully delineated and is a dynamic concept "intended to preserve practical and substantial rights, not to maintain theories." **Davis v. Mills,** 194 U. S. 451.

This Court and the Court of Claims have approved the application of the "taking" theory in the following cases, and a disposition has been shown to require indemnification by the United States arising from factual situations that are no more unique than the facts alleged in petitioners' present case. **U. S. v. Kansas City Life Ins. Co.,** 339 U. S. 799; **U. S. v. Gerlach Live Stock Co.,** 339 U. S. 725; **Coates v. U. S.,** 117 Ct. Cl. 795, 93 F. Supp. 637; **Portsmouth Harbor Land & Hotel Co. v. U. S.,** 260 U. S. 327; **U. S. v. Causby,** 328 U. S. 256; **U. S. v. Pewee Coal Co.,** 115 Ct. Cl. 626; **Fonalledas v. U. S.,** 123 Ct. Cl. 483, 107 F. Supp. 1019; **Iowa-Wisconsin Bridge Co. v. U. S.,** 114 Ct. Cl. 464, 84 F. Supp. 852, cert. den. 339 U. S. 982; **Jackson v. U. S.,** 122 Ct. Cl. 197, 103 F. Supp. 1019.

The essence of petitioners' contention is that their alleged claims are logically consistent with previous decisions of this Court and the Court of Claims.

**Geer v. Connecticut,** 161 U. S. 519, has been used in the previous litigation above referred to and was cited by the Court of Claims in this case as an effective road block to petitioners' claims. That case has not, however, been as uniformly followed as a precedent as its use by the Court of Claims would indicate. In **Missouri v. Holland,** 252 U. S. 416, the **Geer** case was criticized, and **Toomer v. Witsell,** 334 U. S. 385, and **Takahashi v. Fish and Game Commission,** 334 U. S. 410, eliminated the remaining vitality in the rationale of the **Geer** case. Cf. **Gratz v. McKee,** 270 Fed. 713, affirmed 260 U. S. 127.

Are the limits of the "taking" theory now discernible, or are they still beyond the horizon? It is, therefore, submitted that petitioners' case should be reviewed.

**PRAYER.**

Your petitioners, therefore, respectfully pray that a writ of certiorari be issued out of this Honorable Court commanding the United States Court of Claims to certify and send to this Court a complete transcript of the record and all proceedings in said Court of Claims in the cause entitled, "No. 598—53, John L. Bishop et al., Plaintiffs, vs. United States of America, Defendant," to the end that this cause may be reviewed by this Honorable Court and that the judgment of the Court of Claims be reversed and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

Respectfully submitted,

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## APPENDIX A.

No. 598—53.

(Decided November 30, 1954.)

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JOHN L. BISHOP, ET AL. v. THE UNITED STATES.

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ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION TO STRIKE.

Whitaker, Judge, delivered the opinion of the court:

In the first count of their petition plaintiffs sue for the alleged taking of their hunting facilities on certain lands in Alexander County, Illinois, as the result of Proclamation No. 2748, executed on October 1, 1947, which denied permission to hunt wild geese on these lands at any time.

In the second count they sue for the destruction of their crops on these lands by the geese, which, they say, was the natural result of the Proclamation and amounted to a taking by the defendant.

By the Migratory Bird Treaty of 1916 (39 Stat. 1702) the United States and Great Britain agreed to take necessary measures for the protection of migratory birds, which includes wild geese. Pursuant thereto Congress enacted the Act of July 3, 1918 (40 Stat. 755). In 1936 the United States and Mexico entered into a similar treaty (50 Stat. 1311). Subsequently, the Act of July 3, 1918, supra, was amended by the Act of June 20, 1936 (49 Stat. 1555). By section 3 of the latter Act, which amended section 2 of the Act of July 3, 1918, it was provided:

> Unless and except as permitted by regulations made as hereinafter provided * * * it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill, * * * any migratory bird, or any part, nest, or egg of any such birds, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702) and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936.
>
> Subject to the provisions and in order to carry out the purposes of the conventions, * * * the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same in accordance with such determinations, which regulations shall become effective when approved by the President.

Pursuant to the authority of that Act, Proclamation No. 2739 was issued in 1947, by the terms of which the hunting of wild geese was permitted in the State of Illinois only from November 4 to December 3 of each year. Later, on October 1, 1947, Proclamation No. 2748 (61 Stat. 1089) was issued, which denied permission for the hunting of wild geese at any time within an area in Alexander County, Illinois, surrounding Horseshoe Lake Preserve, a bird sanctuary established by the State of Illinois.

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Plaintiffs' rights, if any, grow out of the issuance of this latter proclamation.

There is no question that the proclamation was authorized by the Act of 1936. See **Lansden v. Hart**, 168 F. 2d 409, cert. den. 335 U. S. 858, 180 F. 2d 679, cert. den. 340 U. S. 824. Nor can there be any question that the Act of 1936 was constitutional. So far as we are here concerned, the Act of 1936 made no change in the Act of July 3, 1918, and the latter Act was held constitutional by the Supreme Court in **Missouri v. Holland**, 252 U. S. 416.

Under the Act of 1936 it was provided that "it shall be unlawful at any time * * * to pursue, hunt, take, capture [or] kill * * * any migratory bird * * * included in the terms of the conventions between" the United States, Great Britain, and Mexico "for the protection of migratory birds"—"unless and except as permitted by regulations made as hereinafter provided."

It was thus unlawful to hunt and kill a migratory bird at any time unless permitted to do so by regulations. The regulations permitted this in all of Illinois between November 4 and December 3 of each year, except in the area around the bird sanctuary known as Horseshoe Lake Preserve, in which area it was not permitted at any time.

This would seem to dispose of the first count of plaintiffs' petition. See **Bailey v. Holland**, 126 F. 2d 317; **Lansden v. Hart**, supra.

Plaintiffs' allegation in their petition that the right to hunt wild geese is a property right cannot be taken seriously in view of the Supreme Court's opinion in **Geer v. Connecticut**, 161 U. S. 519, and this court's opinion in **Aleut Community of St. Paul Island v. United States**, 127 C. Cls. 328, and the opinion of the Court of Appeals in

**Lansden v. Hart**, supra. No citizen has a right to hunt wild game except as permitted by the State.

In their second count plaintiffs say that as a result of Proclamation No. 2748 there was a congregation of large flocks of geese on or adjacent to their lands and that these geese destroyed their crops, and that this constituted a taking of them by the United States.

When the Proclamation was issued, some of the present plaintiffs filed a bill in the District Court seeking to enjoin its enforcement. The District Court denied the prayer for an injunction and this action was affirmed by the Court of Appeals. **Lansden v. Hart**, supra. The Court held that the Proclamation was valid and that no property right of the plaintiffs' had been invaded, saying, at page 412:

> No property rights of plaintiffs are involved in these proceedings inasmuch as no person has any property right in live migratory birds and the withdrawal of the privilege of hunting such birds by Federal and State Governments does not deprive anyone of a property right because no such right exists. Permission to hunt, given from time to time by the Federal and State regulations, is not a grant of property, but merely the grant of a privilege. Magner v. People, 97 Ill. 320; American Express Co. v. People, 133 Ill. 649, 24 N. E. 16 S. Ct. 600, 40 L. Ed. 793. Geer v. State of Connecticut, 161 U. S. 519.

The case again came before the Court of Appeals on appeal from an order of the District Court dismissing the bill. In the opinion of the Court of Appeals affirming the action of the District Court, reported in 180 F. 2d 679, it was said, at pages 683, 684:

> * * * In the United States, migratory wild fowl can be hunted only as permitted by regulations issued

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pursuant to the Migratory Bird Treaty Act, which act implements the conventions between the United States and Great Britain and the United States and the United Mexican States. As the act itself is constitutional and as the regulations for the 1947 season issued thereunder (Proclamation 2748) are in all respects legal and valid, it follows that the plaintiffs cannot possibly state a claim under any theory of law upon which relief can be granted.

The fact that plaintiffs have devoted real estate to, and developed other valuable facilities for, the hunting of migratory wild fowl has no bearing upon the point now under discussion. Under Secs. 703 and 704 of the Migratory Bird Treaty Act, no hunting of migratory wild fowl whatsoever is legal except as permitted under the regulations to be issued pursuant to said act. The larger purpose of saving geese from slaughter in the very limited area where they concentrate each year in such great numbers should prevail over the fact that the plaintiffs might enjoy profits if such hunting were permitted. At least regulations to that end are reasonable, rather than arbitrary.

Later, some of the plaintiffs brought an action for the damage to their crops under the Tort Claims Act. This suit was dismissed by the District Court and its action was affirmed by the Court of Appeals. **Sickman v. United States**, 184 F. 2d 616, cert. den., 341 U. S. 939.

Now plaintiffs say that by the issuance of the Proclamation defendant took their crops and is liable therefor under the Fifth Amendment.

Defendant is not liable under this theory, either. The mere fact that plaintiffs' property was damaged as a result of the issuance of this proclamation is not sufficient to show

a taking. Many governmental actions often affect a person's business or property either favorably or adversely. For example, when the prohibition amendment was adopted distilleries were put out of business, but it was held in **Hamilton v. Kentucky Distilleries**, 251 U. S. 146, that the Government was not liable. When rent controls were put into effect property owners' income was seriously affected, but it was held in **Bowles v. Willingham**, 321 U. S. 503, that the Government was not liable. Many other instances readily come to mind. See e. g., **St. Regis Paper Co. v. United States**, 110 C. Cls. 271; **Ora Fina Consolidated Mines v. United States**, 118 C. Cls. 18, cert. den. 341 U. S. 948.

Defendant has not invaded plaintiffs' property, it has asserted no proprietary right in it. The gist of the whole matter is that Congress has passed an Act, valid under the Constitution, which prohibited the hunting of wild geese except as permitted by the Secretary of the Interior, and the Secretary of the Interior has refused to give the required permission in the area in question. For this, of course, the Government is not liable as for a taking.

It is really supererogation to discuss the matter further, but the opinion of the Court of Appeals of New York in **Barrett v. State**, 220 N. Y. 423, 116 N. E. 99; L. R. A. 1918 C, 400, so well sums the matter up that we cannot refrain from concluding with the following quotation from the opinion in that case:

> As to the first, the general right of the Government to protect wild animals is too well established to be now called in question. Their ownership is in the state in its sovereign capacity, for the benefit of all the people. Their preservation is a matter of public interest. They are a species of natural wealth which without special protection would be destroyed. Everywhere and at all times governments have assumed the right to prescribe how and when they may be taken or killed.

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As early as 1705 New York passed such an act as to deer (Colonial Laws, vol. 1, p. 585). A series of statutes has followed protecting more or less completely game, birds and fish.

"The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds. * * * The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion. If the regulations operate, in any respect, unjustly or oppressively, the proper remedy must be applied by that body." (**Phelps v. Racey**, 60 N. Y. 10, 14).

Wherever protection is accorded, harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result.

Defendant's motion to dismiss is granted, and plaintiffs' petition is dismissed. It necessarily follows that plaintiffs' motion to strike is overruled.

It is so ordered.

Laramore, Judge, and Littleton, Judge, concur.

Jones, Chief Judge, took no part in the consideration or decision of this case.

Madden, Judge, dissenting in part:

I do not believe that the traditional right of the State to regulate or prohibit the hunting of wild game or fowl is so broad that a privately owned farm can, in effect, be con-

verted into a game preserve without compensating the owner for the loss of the use of his farm.

Whether or not a "taking," in the constitutional sense, has occurred is often a question of degree. The occasional flight of planes, or overflowing of a stream, does not impose so serious a burden upon land as to be regarded as the taking of a servitude in the land. Nor does the annoyance and damage caused by animals or wild fowl, in ordinary circumstances. But if the circumstances are so extraordinary, as they are alleged to be in this case, that the accomplishment of the public purpose of protecting the wild fowl results in the destruction of a private owner's use of his land, I think the public treasury must compensate the owner. The Fifth Amendment deals with realities, and the alleged deprivation here is as real as if the land had been covered with water or enclosed by a fence.

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## APPENDIX B.

Federal Register Volume 12 No. 194, October 3, 1947,
Pages 6521, 6523

PROCLAMATION 2748
Closed Area Under the Migratory Bird
Treaty Act, Illinois

**By the President of the United States of America**

**A Proclamation**

Whereas the Secretary of the Interior has submitted to me for approval the following regulation adopted by him after notice and public procedure pursuant to section 4 of the Administrative Procedure Act of June 11, 1946 (60 Stat. 238), under authority of the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755, 16 U. S. C. 704), and Reorganization Plan No. II (53 Stat. 1431):

**Regulation Designating as Closed Area Certain Lands and Waters in Alexander County, Illinois**

By virtue of and pursuant to the authority contained in section 3 of the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755, 16 U. S. C. 704), Reorganization Plan No. II (53 Stat. 1431), and in accordance with the provisions of section 4 of the Administrative Procedure Act of June 11, 1946 (60 Stat. 238), I, J. A. Krug, Secretary of the Interior, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of flight of the migratory birds herein referred to and included in the terms of the conventions between the United States and Great Britian for the protection of migratory birds, concluded August 16, 1916, and between the United States and the United Mexican States for the protection of migratory birds and game mammals, concluded February 7, 1936, and in consideration of the obligation imposed by said treaties of insuring the preser-

vation of said migratory birds, do hereby designate as closed area, effective November 3, 1947, in or on which pursuing, hunting, taking, capturing, or killing of all species of wild geese, or attempting to take, capture, or kill such wild geese is not permitted, all that area of land and water situate in Alexander County, Illinois, within the following described exterior boundary:

(Description omitted.)

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed this 25th day of September, 1947.

J. A. Krug,
(Seal) Secretary of the Interior.

And Whereas upon consideration it appears that the foregoing regulation will tend to effectuate the purposes of the aforesaid Migratory Bird Treaty Act of July 3, 1918:

Now, Therefore, I, Harry S. Truman, President of the United States of America, under and by virtue of the authority vested in me by the aforesaid Migratory Bird Treaty Act of July 3, 1918, do hereby approve and proclaim the foregoing regulation of the Secretary of the Interior.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 1st day of
(Seal) October in the year of our Lord nineteen hundred and forty-seven, and of the Independence of the United States of America the one hundred and seventy-second.

Harry S. Truman.

By the President:

Robert A. Lovett,
Acting Secretary of State.

(F. R. Doc. 47-9006; Filed Oct. 2, 1947; 12:12 p. m.)

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# In the Supreme Court of the United States

OCTOBER TERM, 1954

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No. 778

JOHN L. BISHOP, ET AL., PETITIONERS

*v.*

THE UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Claims (Pet. 13-20) is reported in 126 F. Supp. 449.

### JURISDICTION

The judgment of the Court of Claims was entered on November 30, 1954. A timely petition for rehearing was denied on February 8, 1955. The petition for a writ of certiorari was filed on May 9, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the enforcement of valid regulations relating to the hunting of wild geese constitutes a taking of the property upon which the geese concentrate for which just compensation must be paid.

STATEMENT

Petitioners here seek review of a judgment dismissing their petition upon motion. The facts, as alleged in the petition, may be summarized as follows:

Treaties with Great Britain and Mexico providing for the preservation of migratory birds have been implemented by the Migratory Bird Treaty Act of July 3, 1918, 40 Stat. 755, as amended by the Act of June 20, 1936, 49 Stat. 1555, 16 U.S.C. 703, 704. Presidential Proclamations governing the hunting of wild geese, particularly the open season, are issued annually. This was done in 1947 by Proclamation 2739 providing an open season in Illinois from November 4 to December 3, 1947. In October of that year Proclamation 2748 was issued prohibiting hunting of wild geese at any time in an area surrounding Horseshoe Lake Preserve, a wild bird sanctuary established and owned by the State of Illinois. The appropriate state authorities took similar action, and the prohibition has been continued in subsequent years.

Petitioners own or lease farms within the closed area. They sought recovery on two theories. Count I asserted that there had been a taking of petitioners' "hunting businesses" or of petitioners'

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"right to hunt wild geese" (Pet. 6-7). Count II claimed that the geese which had concentrated in the closed area ate petitioners' corn and other crops, that government agents took affirmative steps to insure such concentration and to prevent molestation or removal of any geese, and that these acts "operated to impose a servitude upon the lands and crops involved herein" (Pet. 9). The Court of Claims dismissed the petition, holding that neither count stated a cause of action. Judge Madden dissented as to the second count (Pet. 20).

ARGUMENT

1. In *Lansden* v. *Hart*, 168 F. 2d 409 (C.A. 7), certiorari denied, 335 U.S. 858, and *Lansden* v. *Hart*, 180 F. 2d 679 (C.A. 7), certiorari denied, 340 U.S. 824, attempts of petitioners here to enjoin enforcement of Proclamation 2748 were rejected, the court holding, *inter alia*, that this Proclamation and the companion state proclamation were valid.[1] Under the Migratory Bird Treaty Act as amended, 16 U.S.C. 703, hunting of migratory birds is prohibited "Unless and except as permitted by regulation." It follows that the claim asserted by petitioners in count I lacks merit because they have no right to hunt wild geese or to conduct a business of hunting geese in the area in question. Moreover, as the Court of Claims stated (Pet. 16), "No citizen has a right to hunt wild game except as per-

[1] An attempt to recover damages under the Tort Claims Act was also rejected in *Sickman* v. *United States*, 184 F. 2d 616 (C.A. 7), certiorari denied, 341 U.S. 939.

mitted by the State." The more recent cases cited by petitioners (Pet. 11) do not overrule *Geer* v. *Connecticut*, 161 U.S. 519, in this regard nor do they indicate the existence of private rights in *ferae naturae*.

2. Petitioners' alternate theory, that a servitude has been imposed upon their land and crops, likewise ignores the governmental authority over migratory birds and other *ferae naturae*. There has not been an assertion of any rights in petitioners' lands or of any control over them, but merely a prohibition against hunting geese. In essence petitioners' argument is based upon a refusal to recognize that the authority to control migratory birds includes the power to forbid the hunting of them anywhere, including petitioners' farms. The alleged "depredations" of the geese in eating corn or other crops is simply an incidental consequence of enforcement of the proclamation which is no different from the similar results which follow where protection is given to many wild animals such as deer, moose, mink, etc. (see Pet. 18-19). Far from presenting any new or important question, this is merely another instance of incidental damage resulting from authorized regulations. The suggestion of the dissenting judge that if the damages are sufficiently severe a taking has occurred (Pet. 20) fails to recognize the fundamental difference between appropriation of property and restrictions upon its use flowing from valid regulations. For example, prohibition regulations may render a brewery substantially useless, but there

is no taking under the Fifth or Fourteenth Amendment. *Mugler* v. *Kansas*, 123 U.S. 623, 664-670; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146, 156-157. Certainly the authority over migratory birds is not so limited that enforcement of the regulations in areas where it is most important, *i.e.*, where the birds congregate, can be accomplished only by acquiring the lands in the vicinity.

## CONCLUSION

The decision below is correct and there is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
*Solicitor General.*
PERRY W. MORTON,
*Assistant Attorney General.*
ROGER P. MARQUIS,
*Attorney.*

MAY, 1955.

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